

AZIMULLAH v. MASTER OF S.S. "HALLDOR" & ORS.

[O.C.J. (Choor Singh J.) December 12, 1964]

[Singapore — In Rem. Admiralty Suit No. 1151 of 1963]

Shipping — Carriage of goods by sea — Jurisdiction of court — Motion to set aside writ — Consignment of carpets damaged in transit — Claim against ship-owners.

Bill of lading terms requiring disputes to be decided in Norway — Whether court had jurisdiction — Whether proceedings should be set aside.

The plaintiffs were the consignees of carpets shipped on the vessel "Halldor" from Calcutta to Singapore on two bills of lading issued by the second defendants, a Norwegian shipping company. The vessel was a Norwegian one owned by a Norwegian company whose principal place of business at all material times was Norway. The jurisdiction clause of the bills of lading provided that "Any dispute arising under this bill of lading shall be decided in the country where the carrier has his principal place of business and the law of the said country shall apply unless otherwise stipulated herein." The goods were damaged in transit and the plaintiffs commenced these proceedings claiming damages. A warrant of arrest was issued and the vessel was arrested in Singapore pursuant to the said warrant on October 6 but was released on October 7 on the undertaking given by the owners to the plaintiffs to abide by any order which the court might make in this suit.

The defendants applied to set aside the writ and all subsequent proceedings including the warrant of arrest on the ground that the parties had agreed that any dispute under the bills of lading should be decided by a Norwegian court.

Held: (1) it is well established that, where there is a provision in a contract providing that disputes are to be referred to a foreign tribunal, then, *prima facie*, the court will stay proceedings instituted in this country in breach of such agreement, and will only allow them to proceed when satisfied that it is just and proper to do so;

(2) the court has power to set aside the writ and with it the arrest where the parties have agreed by the contract of carriage to submit all disputes to the courts of a foreign country. The court may decide to do so unless it can be shown that only by allowing the action to continue can the plaintiff be given relief to which he is entitled as where the claim has already become barred in the country agreed;

(3) the question of jurisdiction in a dispute of this nature is a matter which is entirely in the discretion of the court which is called upon to decide the dispute. That discretion has of course to be exercised judicially. Each case must be decided on its own merits and the discretion of the court may be exercised one way or other having regard to the circumstances of the particular case;

(4) in this case having regard to all the circumstances the court would exercise its discretion in favour of the defendants and give effect to the jurisdiction clause of the contract. The writ and all subsequent proceedings will be set aside.

Case referred to:—

- (1) *The Fehmarn* [1957] 1 Lloyd's Rep. 511 and 2 Lloyd's Rep. 517, C.A.

The following cases were also cited in argument:

- (2) *Maharni Woollen Mills Co. v. Anchor Line* (1927) 29 Ll.L.R. 169.
(3) *The Media* (1931) 41 Ll.L.R. 80.

- (4) *Wilson v. Messageries Maritimes* [1954] 2 Lloyd's Rep. 544.

- (5) *The Cap Blanco* [1913] P. 130; 12 Asp. M.L.C. 399.

- (6) *Kirchner & Co. v. Gruban* [1909] 1 Ch. 413.

- (7) *The Christiansborg* (1885) 10 P.D. 141.

- (8) *The Bonn Athenae* (1922) 11 Ll.L.R. 6.

MOTION TO SET ASIDE WRIT.

T. H. A. Potts for the plaintiffs.

A. P. Godwin for the defendants.

Choor Singh J.: This was a motion brought on behalf of the defendants to set aside the writ and all subsequent proceedings in an action brought by the owners of cargo laden on board the vessel "Halldor" against the owners of that vessel.

The facts briefly were these. Under two bills of lading dated 27th August 1962 there were shipped on board the second defendants' vessel "Halldor" at Calcutta a total of 29 rolls of carpets for carriage to and delivery at Singapore. The plaintiffs were the indorsees of and took delivery under both bills of lading. The vessel was a Norwegian one owned by a Norwegian company whose principal place of business at all material times was Norway. Clause 3 of the bills of lading provided as follows:

"Jurisdiction — Any dispute arising under this bill of lading shall be decided in the country where the Carrier has his principal place of business and the law of the said country shall apply unless otherwise stipulated herein".

The goods were damaged in transit and the plaintiffs commenced these proceedings claiming damages. A warrant of arrest was issued and the vessel was arrested in Singapore pursuant to the said warrant on 6th October but was released on 7th October on the undertaking given by the owners to the plaintiffs to abide by any order which the court might make in this suit.

The ground upon which I was invited to set aside the writ was that the parties to the contract of carriage had agreed by their contract that any dispute arising under it should be decided by a Norwegian court.

Counsel for the first and second defendants made the following submission. Although it may be convenient to the plaintiffs to sue in this court, that does not conclude the matter. The plaintiffs had agreed to the dispute being decided in Norway in accordance with Norwegian law. That was quite a common practice. The defendants' vessel was a Norwegian ship, flying the Norwegian flag and trading all over the world, and the desire to have all disputes decided in Norway in accordance with Norwegian law was understandable. The plaintiffs had commenced proceedings in Norway which was the proper

place according to the contract and in the face of the jurisdiction clause the choice before the court was a simple one. The jurisdiction clause must be given effect to and this court should in its discretion refuse to exercise jurisdiction having regard to the express terms of the contract between the parties. These proceedings should therefore be set aside.

The submission of counsel for the plaintiffs was as follows. *Prima facie*, where there was a jurisdiction clause in a contract, like the one in the present case, the defendant was entitled to ask proceedings to be stayed. But in the present case the bills of lading were in English. The ship travelled only in the Far East and not in Norway. It visited the port of Singapore regularly. The consignee of the goods was in Singapore. The lightermen who unloaded the goods and all other witnesses were in Singapore. The only person who was not here was the shipowner. Singapore was not only the most convenient place to have the dispute decided but the proper place, having regard to all the circumstances of the dispute.

A number of authorities were cited by both sides. I consider it unnecessary to deal with all of them because in the words of Willmer J. in *The "Fehmarn"*,⁽¹⁾ "it is well established that, where there is a provision in a contract providing that disputes are to be referred to a foreign tribunal, then, *prima facie*, this court will stay proceedings instituted in this country in breach of such agreement, and will only allow them to proceed when satisfied that it is just and proper to do so". Willmer J. in that case went on to say:

"Where there is an express agreement to submit to a foreign tribunal, clearly it requires a strong case to satisfy the court that that agreement should be overridden and that proceedings in this country should be allowed to continue. But, in the end, it is, and must necessarily be, a matter for the discretion of the court, having regard to all the circumstances of the particular case...."

These observations of Willmer J. were considered with approval by the Court of Appeal in *The "Fehmarn"*⁽¹⁾ which held, that the approach of the learned trial judge in that case to the question which was being debated before him, that is, whether the judge in his discretion ought, or ought not, to stay the proceedings was quite correct.

To my mind, it is clear therefore that the question of jurisdiction in a dispute of this nature is a matter which is entirely in the discretion of the court which is called upon to decide the dispute. That discretion, has, of course, to be exercised judicially. Each case must be decided on its own merits and the discretion of the court may be exercised one way or other having regard to the circumstances of the particular case.

A In this case the defendants were asking the court to set aside the writ and not merely to stay the proceedings. The defendants relied on the following passage appearing on page 18 of Vol. I of *British Shipping Laws*:

B "The situation may be different in cases where the parties have agreed by the contract of carriage to submit all disputes to the courts of a country other than England. In such circumstances the court has power to set aside the writ and with it the arrest. The court may decide to do so unless it can be shown that only by allowing the action to continue can the plaintiff be given the relief to which he is entitled, as where the claim has already become barred in the country agreed".

C This statement of the law was not challenged by the plaintiffs.

D In the present case I found that the plaintiffs had commenced two actions in respect of the same claim. The proceedings in Norway were in accordance with the jurisdiction clause of the contract on which the claim was based. The proceedings in this court were in breach of the said clause. The plaintiffs were not only willing and able to sue in Norway but had in fact already done so by commencing proceedings there to enforce their claim. Under the particular circumstances of this case I felt that I should exercise my discretion in favour of the defendants. The vessel was Norwegian-owned and flew the Norwegian flag. The bills of lading although in the English language were to be governed by Norwegian law. The dispute was to be decided by a Norwegian court in accordance with Norwegian law. And what is more, the dispute was already before a Norwegian court. There was no question of the plaintiffs' claim having become barred in the country agreed. Having regard to all the circumstances I came to the conclusion that I should in my discretion give effect to the jurisdiction clause of the contract, and that these proceedings should not be allowed to continue. It was for these reasons that I made an order setting aside the writ and all subsequent proceedings in this case.

Application granted.

Solicitors: Rodyk & Davidson; Donaldson & Burkinshaw.

LEE LIAN CHOON v. LEE KAR CHOO

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) December 15, 1964]

[Ipoh — Federal Court Civil Appeal No. 7 of 1964]

Trade mark — Passing off — Test to be applied.

I The respondent brought an action alleging infringement of his trade mark and passing off of the appellant's goods as those of the respondent's. The trial judge found that there had been no such infringement by the appellant